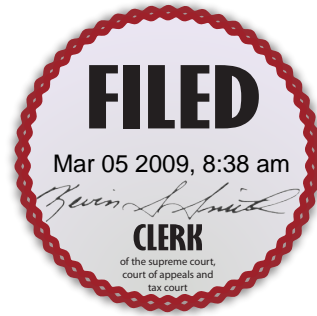


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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|------------------------|---|-----------------------|
| ERIC WOLFE,            | ) |                       |
|                        | ) |                       |
| Appellant-Respondent , | ) |                       |
|                        | ) |                       |
| vs.                    | ) | No. 32A04-0808-CV-463 |
|                        | ) |                       |
| MELISSA WOLFE,         | ) |                       |
|                        | ) |                       |
| Appellee-Petitioner.   | ) |                       |

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APPEAL FROM THE HENDRICKS CIRCUIT COURT  
The Honorable Jeffrey V. Boles, Judge  
Cause No. 32C01-0707-DR-74

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**March 5, 2009**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**MATHIAS, Judge**

Eric Wolfe (“Father”) appeals the order of the Hendricks Circuit Court regarding parenting time and costs. Father raises the following issues:

- I. Whether the trial court abused its discretion by partially denying Father’s Parenting Time Modification Petition;
- II. Whether the trial court abused its discretion by denying Father’s Child Support Contempt Petition;
- III. Whether the trial court abused its discretion by finding Father in contempt; and,
- IV. Whether the trial court abused its discretion by ordering Father to pay Melissa Wolfe’s (“Mother”) attorney fees and the fees of the custody evaluator.

We affirm.

### **Facts and Procedural History**

Mother and Father were married on July 22, 2000, and two children were born of the marriage. Father filed for divorce in South Carolina in 2003. Mother and Father were divorced on April 25, 2006 in South Carolina. Pursuant to the South Carolina Divorce Decree (“South Carolina Decree”), Mother and Father had joint legal custody and Father had sole physical custody. Sometime thereafter, Father relocated to Indiana.

On July 16, 2007, the Hendricks County Child Support Deputy Prosecutor sought to enforce the child support provisions from the South Carolina Decree. On August 29, 2007, the parties filed a child support agreement, which was approved by the trial court. The agreement provided that Mother would pay \$20.00 per week towards her arrearage, however, it did not set forth the amount of the arrearage. On that same day, Mother sought to ensure the parenting time provisions set forth in the South Carolina Decree by

filing a request for hearing in Hendricks Circuit Court. On September 13, 2007, Father responded to Mother's petition to modify.

On November 28, 2007, Father filed a counter petition for modification of custody and parenting time provisions of the South Carolina Decree. On November 29, 2007, the trial court appointed a custody evaluator ("Custody Evaluator"). An order appointing Debra Walsh Rutledge as Custody Evaluator was entered on December 13, 2007. Rutledge (then Debra Walsh) had previously been the guardian ad litem during the divorce proceeding in South Carolina. Father sought her appointment by the Hendricks Circuit Court based on her prior contacts with the family.

On March 24, 2008, Father filed a verified petition for emergency hearing on Mother's spring break parenting time. After a hearing that same day, the trial court entered the following order in the Chronological Case Summary ("CCS"): "children to remain w/ respondent pending report from custody evaluator who must give us a report promptly." Appellant's App. p. 4. Mother was not present at the hearing, was not represented by counsel, and may not have received notice of the hearing despite having been present at Father's home during the two days prior to the hearing for parenting time with her children.

On April 21, 2008, the Custody Evaluator filed her report. On May 2, 2008, Mother filed her verified petition for rule to show cause. On May 8, 2008, Mother filed her emergency petition for rule to show cause for Father's refusal to allow Mother spring break parenting time. On May 13, 2008, Mother filed another verified petition for rule to

show cause alleging that Father would not allow Mother to exercise summer parenting time.

On May 19, 2008, Father filed his verified petition for contempt against Mother for failure to pay child support. On May 22, 2008, Mother objected to Father's motion to combine hearing on her emergency petition for rule to show cause with the hearing already scheduled for July 8, 2008 because the reason for the petition was to ensure her summer parenting time and having a hearing on July 8, 2008 would infringe upon that parenting time.

On May 30, 2008, the trial court held an emergency hearing with both parties present and issued an order appointing Sarah Starkey as the guardian ad litem ("GAL"). On June 10, 2008, the GAL filed her report ("GAL Report") with the trial court. On June 13, 2008, Father moved for a hearing on the GAL Report and Mother moved to follow the recommendations of the GAL Report.

On June 23, 2008, Mother filed a report to the court in response to Father's motion for a hearing on the GAL Report. Mother sought to have the GAL Report followed until further order of the trial court.

On July 8, 2008, Father filed a motion requesting specific findings of fact and conclusions of law pursuant to Indiana Trial Rule 52(C) but did not file any proposed findings or conclusions. On July 10, 2008, the trial court issued its Findings of Fact and Judgment. On July 14, 2008, the GAL sought payment of her fees. The following day the trial court ordered the parties to split the fees equally. Father now appeals.

## **Standard of Review**

Mother failed to file an appellee's brief. As such, we will not undertake the burden of developing arguments for the appellee. Painter v. Painter, 773 N.E.2d 281, 282 (Ind. Ct. App. 2002). Applying a less stringent standard of review, we may reverse the trial court if the appellant establishes prima facie error. Id. Prima facie error is defined as at first sight, on first appearance, or on the face of it. Id.

When the trial court has entered findings of fact and conclusions of law pursuant to Indiana Trial Rule 52, we apply the following two-tiered standard of review: whether the evidence supports the findings and whether the findings support the judgment. Staresnick v. Staresnick, 830 N.E.2d 127, 131 (Ind. Ct. App. 2005). The trial court's findings and conclusions will be set aside only if they are clearly erroneous, that is, if the record contains no facts or inferences supporting them. Id. A judgment is clearly erroneous when a review of the record leaves us with a firm conviction that a mistake has been made. Id. We neither reweigh the evidence or assess the credibility of witnesses, but consider only the evidence most favorable to the judgment. Id. We review conclusions of law de novo. Id.

### **I. Father's Parenting Time Modification Petition**

In general, we review custody modifications for an abuse of discretion, with a "preference for granting latitude and deference to our trial judges in family law matters." Kirk v. Kirk, 770 N.E.2d 304, 307 (Ind. 2002). When reviewing a trial court's ruling on a petition to modify custody, we may neither reweigh the evidence nor judge the credibility of the witnesses. Van Wieren v. Van Wieren, 858 N.E.2d 216, 221 (Ind. Ct.

App. 2006). Rather, we consider only the evidence most favorable to the judgment and any reasonable inferences that may be drawn from that evidence. Id.

A petitioner seeking modification of a child custody order bears the burden of demonstrating that the existing custody arrangement should be altered. Id. A court may not modify a child custody order unless: (1) the modification is in the best interests of the child, and (2) there is a substantial change in one or more of the factors set forth in Indiana Code section 31-17-2-8 (2008), that a trial court may consider when it originally determines custody. Ind. Code § 31-17-2-21 (2008).

*A. Findings of Fact and Conclusions*

Father argues that the trial court abused its discretion when it refused to allow him to file proposed findings of fact and conclusions of law. Indiana Trial Rule 52(C) provides:

In any case where special findings of fact and conclusions thereon are to be made the court shall allow and may require the attorneys of the parties to submit to the court a draft of findings of fact and conclusions thereon which they propose or suggest that the court make in such a case.

The motion filed by Father only requests “specific Findings of Fact and Conclusions of Law.” Appellant’s App. p. 417. Father did not notify the trial court during any of the hearings in this case of his intention to file proposed Findings and Conclusions. Absent a showing by Father that he asked the trial court to be allowed to file Findings and Conclusions, we cannot conclude that the trial court abused its discretion by not allowing the filing of said Findings and Conclusions.

*B. GAL Report*

Father argues that the trial court abused its discretion when it relied upon the GAL Report, rather than the report provided by the Custody Evaluator. Father is essentially arguing that the GAL was not as experienced as the Custody Evaluator, therefore her report should not have been used to the extent it was by the trial court. This is a blatant request to reassess the credibility of the witnesses which we will not do. Therefore the trial court did not abuse its discretion in its use of the GAL Report.

## **II. Trial Court's Contempt Findings**

Indirect contempt is the willful disobedience of any lawfully entered court order of which the offender had notice. Conrail v. Estate of Martin, 720 N.E.2d 1261, 1264 (Ind. Ct. App. 1999). Whether a person is in contempt of a court order is a matter left to the trial court's discretion. Id. Upon review, we will reverse the trial court's determination only where an abuse of discretion has been shown. Id. An abuse of discretion occurs only when the trial court's decision is against the logic and effect of the facts and circumstances before it. Id.

### *A. Father's Contempt Petition*

Father argues that the trial court abused its discretion when it did not find Mother in contempt for failure to pay child support and failing to find that Mother has amassed a child support arrearage. At the hearing, Mother testified that she had changed jobs and notified the Hendricks County Prosecutor to begin the paycheck garnishment but that it had not happened. Based on Mother's testimony the trial court could easily determine that Mother did not willfully disobey the order of the trial court, therefore, the trial court did not abuse its discretion.

### *B. Child Support Arrearage*

Father also argues that the trial court abused its discretion when it found that Father had not provided sufficient admissible evidence to determine the amount of Mother's child support arrearage. Father asks this court to reweigh the evidence at trial to determine the amount of child support arrearage owed by Mother which we will not do. The trial court rightly concluded that Father had not provided admissible evidence on the status of any arrearage owed by Mother.

### *C. Summer Parenting Time Contempt*

Father argues that the trial court abused its discretion when it determined that he had willfully disobeyed the South Carolina Decree regarding summer parenting time. He bases his argument on the CCS entry for March 24, 2007 following the Emergency Hearing related to spring break visitation with Mother. The CCS states as follows:

[Father] files Verified Petition for Emergency Hearing on [Mother's] Spring Break Parenting Time with Minor Children filed w/ Verified Motion for Emergency Order on [Mother's] Spring Break Parenting Time with Minor Children. [Father] w/ Ms. Bugalla, hearing had, children to remain w/ [Father] pending report from custody evaluator who must give us a report promptly.

Appellant's App. p. 4. Also, Mother was not present at this hearing.

Mother filed an Emergency Verified Petition for Rule to Show Cause on May 13, 2008 in response to Father's refusal to allow summer parenting time with Mother. A flurry of motions and responses followed this filing, which culminated in a May 30, 2008 hearing on Mother's petition. On May 30, 2008, the trial court held a hearing on Mother's request for an emergency hearing at which time the trial court appointed Sarah Starkey as the GAL and ordered that the GAL file a report with the trial court in ten days.



The trial court left the July 8, 2008 hearing on the calendar and did not address the issue of Mother's summer parenting time. The GAL filed her report with the trial court on June 11, 2008 with service to all parties. Again, a flurry of motions and responses followed. A hearing was finally held on July 8, 2008. The trial court entered findings of fact and judgment on July 10, 2008.

Despite claims that Father believed that the March 24, 2008 order required him to keep the children and not allow Mother's parenting time, the facts indicate otherwise. The March 24, 2007 order was made on the basis of an emergency petition regarding spring break parenting time and the order spoke of the children remaining with Father pending the custody evaluator's report. This order did not constitute a complete abrogation of Mother's parenting time subject to another hearing. In fact, the order specifically stated that the children would remain with Father pending the custody evaluator's report which was presented to the parties on April 21, 2008. Based on the facts and circumstances of this case, the trial court did not abuse its discretion in finding that Father was in indirect contempt of court for interfering with Mother's summer parenting time.

### **III. Attorney Fees and Custody Evaluator Fees**

Father argues that the trial court abused its discretion in ordering him to pay Mother's attorney fees and the custody evaluator fees. In post-dissolution proceedings, the trial court may order a party to pay a reasonable amount for attorney's fees and the cost to the other party of maintaining or defending any proceeding under the relevant statutes. Ind. Code § 31-16-11-1 (2008). The trial court has broad discretion in awarding

attorney fees. Selke v. Selke, 600 N.E.2d 100, 102 (Ind. 1992). We will reverse the trial court's decision only when it is against the logic and effect of the facts and circumstances before the court. Id.

In assessing attorney's fees, the court may consider such factors as the resources of the parties, the relative earning ability of the parties, and other factors that bear on the reasonableness of the award. Id. In addition, any misconduct on the part of one of the parties that directly results in the other party incurring additional fees may be taken into consideration. Claypool v. Claypool, 712 N.E.2d 1104, 1110 (Ind. App. Ct. 1999), *trans. denied*. The court need not give reasons for its determination. In re Marriage of Tearman, 617 N.E.2d 974, 978 (Ind. Ct. App. 1993).

As noted above, the trial court did not abuse its discretion in finding that Father was in contempt for interfering with Mother's summer parenting time. Therefore, the trial court's determination that Father pay Mother's attorney fees for his misconduct in interfering with Mother's summer parenting time is also not an abuse of discretion.

As to the custody evaluator fees, Father bases his argument on a perceived bias on the part of the trial court to explain why Mother was not required to pay any of the fees. However, the initial order appointing the custody evaluator specifically states that "[t]he parties shall participate in a custody evaluation to be paid by Respondent Eric Wolfe." Appellant's App. p. 311.

We also note that Father requested the custody evaluator, sought and received the appointment of an out-of-state custody evaluator, and continued to use the custody evaluator despite the appointment of a GAL by the trial court thereby causing additional

fees to accrue. In fact, at the July 8, 2008 hearing, the Custody Evaluator noted that she was unsure as to her status at the hearing because of the presence of a GAL. Tr. p. 101. We note that her travel costs and other costs had been paid for by Father or were his responsibility. Tr. p. 96.

### **Conclusion**

The trial court did not abuse its discretion by partially denying Father's Parenting Time Modification Petition, by denying Father's Child Support Contempt Petition, by finding Father in contempt, and by ordering Father to pay Melissa Wolfe's ("Mother") attorney fees and the fees of the custody evaluator.

Affirmed.

BAILEY, J., and BARNES, J., concur.